U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 03 August 2004

In the Matter of:

CHARLIE LAWSON,
Claimant

v.

Case No. 2003-BLA-05904

SHAMROCK COAL COMPANY,
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-In-Interest

Before: Daniel F. Solomon
Administrative Law Judge

DECISION AND ORDER - DENYING CLAIM[1]

Jurisdiction and Claim History

This case comes on a request for a hearing pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §§ 901 *et seq*. (the Act) (DX-25),[2] dated February 8, 2003. [3]

---

[1] 20 CFR § 725.477, 5 CFR § 554-7 (Administrative Procedure Act), and also 20 CFR § 725.479 Finality of decisions and orders.
(a) A decision and order shall become effective when filed in the office of the deputy commissioner (see § 725.478), and unless proceedings for suspension or setting aside of such order are instituted within 30 days of such filing, the order shall become final at the expiration of the 30th day after such filing (see § 725.481).
(b) Any party may, within 30 days after the filing of a decision and order under § 725.478, request a reconsideration of such decision and order by the administrative law judge. The procedures to be followed in the reconsideration of a decision and order shall be determined by the administrative law judge.
(c) The time for appeal to the Benefits Review Board shall be suspended during the consideration of a request for reconsideration. After the administrative law judge has issued and filed a denial of the request for reconsideration, or a revised decision and order in accordance with this part, any dissatisfied party shall have 30 days within which to institute proceedings to set aside the new decision and order or affirmance of the original decision and order.

[2] References to "DX" and "EX" refer to the exhibits of the Director and the employer, respectively. The transcript

A hearing was held on January 6, 2004, in London, Kentucky. The Claimant is represented by Zaring P. Robertson, Esquire, Morgan, Madden, Brashear & Collins, PLLC, Richmond, Kentucky. Shamrock Coal Company (hereinafter "Employer") is represented by John H. Baird, Esquire, Baird & Baird, PSC, Pikeville, Kentucky. An appearance was entered for the Director, OWCP, who was not represented at the hearing. The Claimant appeared at the hearing and testified. Twenty Nine (29) Director's exhibits, DX 1 through DX 29,[4] and ten (10) Employer's exhibits, EX 1 through EX 10, were admitted into evidence.[5]

The employer submitted two depositions after the hearing, which were admitted into the record as Employer's Exhibits 9 and 10, subject to further review to determine whether these depositions are clarifications of previous medical reports of Drs. Dahhan and Repsher. (Tr. 41). Upon review of these depositions, I conclude that they are limited to explanations of narrative medical reports previously submitted by these physicians, and general explanations of their credentials.

In reaching my decision, I have reviewed and considered the entire record, including all exhibits, the testimony at hearing and the arguments of the parties.

Because this subsequent claim was filed after January 20, 2001, evidence is limited subject to 20 CFR § 725.414(a)(2)(2001). Parts 718 (standards for award of benefits) and 725 (procedures) of the regulations have undergone extensive revisions effective January 19, 2001. 65 Fed. Reg. 79920 *et seq*. (2000). *See also* 68 Fed. Reg. 69930-69935 (2003). The Department of Labor has taken the position that as a general rule, the revisions to Part 718 should apply to pending cases because they do not announce new rules, but rather clarify or codify existing policy. *See* 65 Fed. Reg. at 79949-79950, 79955-79956 (2000). Changes in the standards for administration of clinical tests and examinations, however, would not apply to medical evidence developed before January 19, 2001. 20 C.F.R. § 718.101(b) (2002). The United States District Court for the District of Columbia upheld the validity of the new regulations in ***National Mining Association v. Chao***, 160 F.Supp. 2d 47 (D.D.C. 2001). However, the district court's decision was affirmed in part, reversed in part, and the case remanded on appeal to the United States Court of Appeals for the District of Columbia Circuit. ***National Mining Association v. Department of Labor***, 292 F.3d 849 (D.C.Cir. 2002) (upholding most of the revised rules, finding some could be applied to pending cases, while others should be applied only prospectively, and holding that one rule empowering cost shifting from a Claimant to an employer exceeded the authority of the Department of Labor). Recently, the Benefits Review Board has upheld the evidence development provisions of 20 C.F.R. § 725.414 (2002). ***Dempsey v. Sewell Coal Co.***, ___ B.L.R. ___, BRB Nos. 03-0615 BLA/A (June 28, 2004) (*en banc*).*f*

The Claimant filed his first claim for benefits under the Act on April 19, 1993. (DX 1-1).

---

of the hearing is cited as "Tr." and by page number.

[3] And the regulations at 20 C.F.R. Ch. VI, Subchap. B (the Regulations).

[4] At Tr. 5.

[5] At Tr. 28-29.

This claim was denied by Administrative Law Judge Robert R. Hillyard, who issued on November 20, 1996, a decision and order denying benefits because of the Claimant's failure either to prove the existence of pneumoconiosis or to establish total respiratory disability. (DX 1). This decision was affirmed on appeal by the Benefits Review Board on December 5, 1997. (DX 1).

The current subsequent claim seeking black lung benefits was filed on December 27, 2001. (DX 2). After review by the District Director, a Schedule for the Submission of Additional Evidence was issued on June 26, 2002, (DX 19), and the claim was denied by the District Director on January 30, 2003. (DX 24). The Claimant, on February 8, 2003, requested a hearing before an administrative law judge. (DX 25). The claim was referred to this office on May 9, 2003. (DX 29).

As Mr. Lawson's most recent coal mine employment, between 1965 and 1993, was with Shamrock Coal Company at a mine located in the Commonwealth of Kentucky, the rulings of the United States Court of Appeals for the Sixth Circuit control this case. ***Danko v. Director, OWCP***, 846 F.2d 366, 368, 11 BLR 2-157 (6th Cir. 1988). *See* ***Broyles v. Director, OWCP***, 143 F.3d 1348, 1349, 21 BLR 2-369 (10th Cir. 1998); ***Kopp v. Director, OWCP***, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); ***Shupe v. Director, OWCP***, 12 BLR 1-200 (1989) (*en banc*).

Mr. Lawson testified at the hearing. He is 57 years old, with a date of birth of September 16, 1946. (Tr. 20). He lives with his wife, Helen, who is his only dependent. (TR. 20-21). Mr. Lawson testified that all of his work was with the Shamrock Coal Company. (Tr. 10). He drove a shuttle car, also worked part-time as a roof bolter, and drove supplies to the coal face, all of which was underground, and was described as "rough" work. (Tr. 9-12). Near the end of his coal mining career, the Claimant would be required to lift fifty or sixty pound bags of rock dust. (Tr. 16). He testified that he quit the mines because of breathing trouble. (Tr. 16).

The Claimant sought medical treatment for his breathing, and receives Social Security benefits for "total disability." (*See* DX 6). He stated that he continues to have breathing difficulties, and that climbing two to three flights of stairs "really gets to me." He can walk a half-mile before needing to stop. (Tr. 17). He also confirmed that he is receiving workers' compensation benefits for black lung.[6] He also recalled that he suffered a heart attack in 1993. (Tr. 19).

On cross-examination, the Claimant acknowledged that, prior to receiving the state award in 1995, a Dr. Bushey told him that he was "totally disabled due to [his] black lung." (Tr. 22).

Issues

A miner must prove whether: (1) the miner suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) the miner is totally disabled, and (4) the miner's total disability is caused by pneumoconiosis. ***Gee v. W. G. Moore and Sons***, 9 B.L.R. 1-4 (1986) (en banc); ***Baumgartner v. Director, OWCP,*** 9 B.L.R. 1-65 (1986) (en banc). *See*

[6] On October 24, 1995, the Claimant was awarded occupational disease benefits from the Commonwealth of Kentucky. (DX 7).

***Mullins Coal Co., Inc. of Virginia v. Director, OWCP*,** 484 U.S. 135, 141, 11 B.L.R. 2-1 (1987). The failure to prove any requisite element precludes a finding of entitlement. ***Anderson v. Valley Camp of Utah*, *Inc.*,** 12 B.L.R. 1-111 (1989); ***Perry v. Director*, *OWCP*,** 9 B.L.R. 1-1 (1986) (*en banc*).

The specific issues[7] for adjudication in this case are:

1. Whether this subsequent claim is timely;
2. Whether the medical evidence establishes that the Claimant suffers from pneumoconiosis;
3. If so, whether the Claimant's pneumoconiosis arose at least in part out of his coal mine employment;
4. Whether the Claimant suffers from a totally disabling pulmonary or respiratory impairment;
5. Whether any total respiratory disability is caused by pneumoconiosis. 20 C.F.R. § 718.204(c); and
6. Whether the evidence establishes a change in applicable condition of entitlement since the denial of Mr. Lawson's first claim.

Stipulation

The employer has conceded that the Claimant has one dependent for purposes of augmentation of any benefits award. (Tr. 21).

Burden of Proof

"Burden of proof," as used in the this setting and under the Administrative Procedure Act[8] is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.. .Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C.A. § 556(d).[9] The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. ***Director, OWCP, Department of Labor v. Greenwich Collieries*** [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994).[10]

---

[7] The referral Form CM-1025 does not specifically list either timeliness or whether the Claimant has satisfied the threshold requirements for a subsequent claim. (DX 29). This document nevertheless incorporates by reference issues that were raised by letter, dated March 10, 2003, in which the employer, *inter alia*, contests both timeliness and whether the Claimant has met the requirements of 20 C.F.R. § 725.309. (DX 28). The employer also challenges the validity of the regulations, as amended. I reject the employer's arguments on this issue, but duly note that the challenge to the regulations has been raised.

[8] 33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with [the APA]"); 5 U.S.C. § 554(c)(2). Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. § 932(a).

[9] The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984); ***Kaiser Steel Corp. v. Director, OWCP*** [***Sainz***], 748 F.2d 1426, 7 BLR 2-84 (10th Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a Claimant to an employer/carrier.

[10] Also known as the risk of nonpersuasion, *see* 9 J. Wigmore, **Evidence** § 2486 (J. Chadbourn rev.1981).

A Claimant has the general burden of establishing entitlement and the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production, the obligation to come forward with evidence to support a claim. Therefore, the Claimant cannot rely on the Director to gather evidence. A Claimant, bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 BLR 1-860 (1985).

Length of Coal Mine Employment

The length of the Claimant's qualifying coal mine employment has not been contested. I credit Mr. Lawson with 28 years of coal mine employment.

Medical Evidence

TREATMENT RECORDS

The record contains treatment notes and reports from the Marymount Medical Center in London, Kentucky. (DX 23). On April 25, 2000, the Claimant was admitted to Marymount complaining of epigastric and upper abdominal pain. Based on an "abdominal series," Dr. Eduardo Gomez diagnosed "chronic lung disease. Constipation pattern. Old left hip injury. No definite acute process."

On May 22, 2001, Mr. Lawson was admitted with epigastric pain. A gallbladder ultrasound was performed, and he underwent surgery for a gangrenous gallbladder. Dr. Alan Graham performed a physical examination, and observed, *inter alia*, that the lungs were "clear," and diagnosed cholecystitis.

X-RAY INTERPRETATIONS

X-RAY DATE	***READING DATE***	***EXH.***	***PHYSICIAN/ QUALIFICATIONS***	***INTERPRETATION***
2/27/02	2/27/02	DX 11	Wicker	2/2
2/27/02	5/3/02	DX 11	Sargeant/B-BCR	Quality 2
2/27/02	12/3/03	EX 4	Wiot/B-BCR	0/0
8/8/02	8/8/02	DX 22	Dahhan/B	0/1, film quality 1
12/9/03	12/9/03	EX 6	Rosenberg/B	0/1

PULMONARY FUNCTION STUDIES

Pulmonary function studies may provide some of the acceptable documentation for a reasoned medical opinion diagnosis of pneumoconiosis at 20 C.F.R. § 718.202(a)(4). Total disability may be established through a preponderance of qualifying pulmonary function studies. The quality standards for pulmonary function studies are located at 20 C.F.R. § 718.103 (2002) and require, in relevant part, that (1) each study be accompanied by three tracings, ***Estes v. Director, OWCP***, 7 B.L.R. 1-414 (1984), (2) the reported FEV1 and FVC or MVV values constitute the best efforts of three trials, and, (3) for claims filed after January 19, 2001, a flow-volume loop must be provided. The administrative law judge may accord lesser weight to those studies where the miner exhibited "poor" cooperation or comprehension. ***Houchin v. Old Ben Coal Co.***, 6 B.L.R. 1-1141 (1984); ***Runco v. Director, OWCP***, 6 B.L.R. 1-945 (1984). To be qualifying, the regulations provide that the FEV1 and either the MVV or FVC values must be

equal to or fall below those values listed at Appendix B for a miner of similar gender, age, and height, or the ratio of the FEV1/FVC equals 55% or less. Assessment of the pulmonary function study results is dependent on the miner's height, which has been recorded from 70.5 to 72 inches. Considering this discrepancy, I find that the Claimant's height is 71.25 inches for purposes of evaluating the pulmonary function studies. ***Protopappas v. Director, OWCP***, 6 B.L.R. 1-221 (1983).

The following pulmonary function studies are in the record:

DATE	***EXH.***	***PHYSICIAN***	***FEV1***	***FVC***	***MVV***	***QUALIFY***	***HT/AGE***
2/27/02	DX 11	Wicker	2.18	2.64	60.19	Yes	70.5"/55

The Claimant was said to have performed this test with "good" cooperation and comprehension. (DX 11).

8/8/02	DX-22	Dahhan	2.47	3.28	44	No	71.25"/55
8/8/02	(with bronchodilator)		2.46	3.70	38	No	[181 cm]

This test was performed with "poor" cooperation. Tracings are attached. Dr. Dahhan opined that this test was invalid due to poor effort.

The Claimant's height was measured at 181 cm. I will take administrative notice that this equates to 71.25".

12/9/03	EX-8	Rosenberg	2.25	3.38	54	No	72"/57
12/9/03	(with bronchodilator)		2.42	4.01	77	No	

This test was performed with "fair" effort, according to the computer printout. Tracings are attached. Dr. Rosenberg observed that the test showed "No restriction." The MVV was "severely reduced; incomplete effort." He also noted that "[i]ncomplete efforts make assessment for the presence of obstruction impossible. The diffusing capacity corrected for lung volumes is normal, indicating the alveolar capillary bed is intact."[11]

ARTERIAL BLOOD GAS STUDIES

Arterial blood gas studies may provide some of the acceptable documentation for a reasoned medical opinion diagnosis of pneumoconiosis at 20 C.F.R. § 718.202(a)(4). Total disability may also be established by qualifying blood gas studies under 20 C.F.R. § 718.204(b)(2)(ii) (2002). In order to be qualifying, the PO2 values corresponding to the PCO2 values must be equal to or less than those found at the table at Appendix C. The following blood gas studies are in the record:

DATE	***EXH***	***PHYSICIAN***	***PCO2***	***PO2***	***QUALIFY***
2/27/02	DX 11	Wicker	34.1	88.3	No
8/8/02	DX-22	Dahhan	39.4	81.5	No

The Claimant said that he was unable to exercise due to "lung and heart problems." (DX 22).

12/9/03	EX-8	Rosenberg	35.4	92.4	No

Dr. Rosenberg opined that the results of this study were "normal." (EX-8).

---

[11] An administrative law judge may rely on the reviews of a pulmonary function test by a medical experts to ascertain their probative value. *See* ***Old Ben Coal Co. v. Battram***, 7 F.3d 1273, 18 BLR 2-42 (7th Cir. 1993); ***Winchester v. Director, OWCP***, 9 BLR 1-177 (1986).

MEDICAL OPINIONS AND REPORTS

At the request of the Department of Labor, Dr. Mitchell Wicker, Jr., examined the Claimant on February 27, 2002, and submitted his report that day. (DX 11). The Claimant's medical history was significant for a heart attack in 1993. Dr. Wicker also noted that the Claimant related a past diagnosis of chronic obstructive pulmonary disease. Mr. Lawson smoked for seven years between 1986 and 1993. He presented with complaints of dyspnea, cough, ankle edema and paroxysmal nocturnal dyspnea.

On examination, the Claimant's lungs were clear to auscultation. There were no positive findings in the extremities. Dr. Wicker noted the results of clinical testing, and interpreted a chest x-ray as showing 2/2 profusion. He diagnosed "[g]rade 2/2 Q/T pneumoconiosis involving all 6 lung fields[.]" As to impairment, Dr. Wicker opined that "[t]his individual's respiratory capacity does not appear to be adequate to perform his previous occupation in the coal mining industry due to his previous history of coal mining exposure and cigarette abuse." The doctor responded "not applicable" to questions about the etiology of the pneumoconiosis and the cause of the Claimant's inability to return to coal mine employment. In a separate sheet, the doctor explained his diagnosis as based on history, and categorized the Claimant's pulmonary impairment as "no impairment." Yet he again said that the Claimant did not have the respiratory capacity to perform the work of a coal miner. (DX 11).

Dr. Abdulkader Dahhan examined the Claimant on August 8, 2002, and submitted his report of this examination and a review of the Claimant's medical records on February 15. (DX 22). Dr. Dahhan recorded a coal mine work history of 28 years underground, working as a shuttle car operator, continuous miner operator and as a motor man. The Claimant also reported a smoking history of seven years. Mr. Lawson complained of occasional wheezing, and "dyspnea on exertion such as a flight of stairs." The doctor noted a history of coronary artery disease, post myocardial infarction. The Claimant suffered a heart attack in 1993, followed by two angioplasty procedures, one in 1993 and the second in 1995.

The physical examination results included findings of "good air entry to both lung with no crepitation, rhonchi or wheeze" on examination of the chest. Dr. Dahhan saw no clubbing or edema in the extremities.

Dr. Dahhan concluded that there was "insufficient objective data to justify the diagnosis of coal workers' pneumoconiosis based on the normal clinical examination of the chest, negative x-ray reading for pneumoconiosis, normal blood gases and normal lung volumes and diffusion capacity measurements." Although the ventilatory test was invalid, the doctor thought that the Claimant "appear[ed] to have no evidence of total or permanent pulmonary disability based on the various parameters of his respiratory system." He added:

> From a respiratory standpoint, Mr. Lawson retains the physiological capacity to continue his previous coal mining work or job of comparable physical demand with no evidence of pulmonary impairment and/or disability caused by, related to, contributed to or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis.

(DX 22). He also noted that the Claimant's coronary artery disease and post angioplasty condition, as well as his back pain, were not caused by coal mine dust exposure.

Dr. Dahhan reiterated at his deposition that the Claimant "probably" does not have any pulmonary impairment. (EX 10). He explained this qualification because he thought that the Claimant "does not perform a valid spirometry." (EX 10 at 11).

Dr. Lawrence Repsher reviewed the Claimant's medical records and submitted his conclusions based on this review on December 4, 2003. (EX 2). The doctor recorded a coal mine employment history of 28 years, noting that Claimant worked underground as a shuttle car operator, continuous miner operator and motor man until retiring in 1993. The records also revealed that Claimant had smoked briefly in his 20's, or that he smoked one pack per day for seven years.

With respect to the clinical studies placed before him for review, Dr. Repsher opined:

> The pulmonary function tests, arterial blood gas studies (ABG's), and electrocardiograms are summarized on Attachment B. None of these spirometric studies, dating back to 1992, are valid due to poor effort on Mr. Lawson's part. The noneffort dependent studies, such a arterial blood gases, are consistently normal, both at rest and improve following exercise. Lung volumes performed on 15 August 2002, demonstrate a normal residual volume and total lung capacity and the corrected diffusion capacity is normal also. In summary, there is no objective evidence of a respiratory impairment [on the basis of these clinical tests].

After he reviewed medical opinions that had been submitted, Dr. Repsher concluded that there was no evidence to justify a diagnosis of coal workers' pneumoconiosis, that Mr. Lawson had "no respiratory impairment that has arisen from his coal mine employment with the inhalation of coal dust" and that the Claimant "retains the respiratory capacity to perform the work of an underground coal miner or to do work requiring a similar degree of physical labor." The doctor saw "no evidence of a totally disabling respiratory or pulmonary impairment related to coal mine dust exposure, either in whole or in part." (EX 2). Dr. Repsher is board certified in internal medicine, with a subspecialty in pulmonary disease. He is also a B-reader. (EX 3).

The employer secured Dr. Repsher's deposition testimony. (EX 9). The doctor discussed his medical report, reiterating its conclusions that there is no evidence of pneumoconiosis and no evidence of a pulmonary impairment. He again concluded that "certainly from a respiratory point of view [the Claimant] could do any job in the coal mines even that requiring essentially heavy work." (EX 9 at 29).

Dr. David M. Rosenberg both personally examined the Claimant and reviewed his medical records. He submitted a medical report on December 12, 2003, based on this review and his physical examination of December 9. (EX-6). Mr. Lawson told Dr. Rosenberg of occasional dizziness, particularly with the breathing tests. He also related that he suffered from smothering at night, and that he "would be winded," and that he was limited to climbing two flights of stairs.

Mr. Lawson recalled that his breathing problems had persisted for about ten years, and that he sometimes had a productive cough. He needed two pillows to sleep, and would awaken with shortness of breath. Dr. Rosenberg reported that the Claimant had suffered a myocardial infarction, that he underwent an angioplasty and "rotor procedures to remove plaque." Dr. Rosenberg noted a work history of 28 years in the mines. The Claimant told the doctor that he generally operated a motor and shuttle car, work that required him to lift 50 pounds or so and move this weight a distance of 10 to 15 feet.

On physical examination, Dr. Rosenberg observed "equal expansion ... without rales, rhonchi or wheezes[.]" The doctor saw no cyanosis, edema or clubbing. The lung fields were clear. The Claimant's x-ray showed "chronic scarring from a previous inflammatory reaction."

Dr. Rosenberg opined:

> ... Mr. Lawson's chest x-ray does not reveal the micronodularity associated with past coal dust exposure. ... Mr. Lawson does not have the interstitial form of coal workers' pneumoconiosis[.]
>
> From a functional perspective, Mr. Lawson does not have restriction or a decreased diffusing capacity. In addition, his oxygenation is normal on his blood gas determinations. Pulmonary function tests were performed with incomplete efforts with respect to obstruction, but if they had been performed with good efforts, they probably would have been normal. The recorded values are clearly above disability standards. ...
>
> [I]t can be stated with a reasonable degree of medical certainty, that Mr. Lawson does not have COAL WORKERS' PNEUMOCONIOSIS or associated impairment. He obviously has coronary artery disease, which has not been caused or hastened by the past inhalation of coal mine dust exposure.

(EX 6). Dr. Rosenberg is board certified in internal medicine, pulmonary disease and occupational medicine. (EX 7).

Discussion

Timeliness

As stated above, this claim arises within the territorial jurisdiction of the Sixth Circuit. In ***Tennessee Consolidated Coal Co. v. Kirk***, 264 F.3d 602, 22 B.L.R. 2-288 (6th Cir. 2001), that court held:

> The three-year limitations clock begins to tick *the first time* that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims, and, pursuant to [***Ross***], the clock may only be turned back if the miner returns to the mines after a denial of benefits. There is thus a distinction between premature claims that are supported by a medical determination ... and those claims that come with or acquire such support. Medically supported claims, even if ultimately deemed

> "premature" because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period. Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course he may continue to pursue pending claims.

Kirk, 244 F.3d at 608. The Board in ***Furgerson v. Jericol Mining, Inc.***, 22 B.L.R. 1-216 (2002) (en banc) concluded that this language constitutes a holding, and not mere dicta, with respect to duplicate and subsequent claims arising within the territorial jurisdiction of that circuit.

Section 728.308 of the Secretary's regulations in part sets forth a rebuttable presumption that every claim for benefits is timely. 20 C.F.R. § 725.308. I find that this presumption has been rebutted by evidence of record. On cross-examination, the Claimant acknowledged that, prior to receiving his state black lung award, Dr. Bushey had told him that he was totally disabled by black lung. (Tr. 22). Dr. Glen R. Baker opined that further coal mine dust exposure was contraindicated, and also concluded that the Claimant "may have difficulty doing sustained manual labor, on an 8 hour basis, even in a dust-free environment, due to these conditions [coal workers' pneumoconiosis and dyspnea on exertion]." (DX 1-31).

Upon rebuttal of the presumption of timeliness, the Claimant may have an opportunity to avoid the dismissal of his claim by demonstrating the existence of any extraordinary circumstances. 20 C.F.R. § 725.308(c). The record was left open, primarily for the employer's attorney to submit the deposition testimony of Drs. Dahhan and Repsher. (Tr. 44). At the hearing, following a discussion of whether timeliness had been contested, the undersigned also directed counsels' attention to Section 725.308. (Tr. 44).

I find that this subsequent claim is untimely. Initially, the presumption of timeliness, as noted above, has been rebutted. The record does not contain evidence detailing any extraordinary circumstances that would relieve the Claimant from this default. Claimant, although on notice that the employer would contest the timeliness of this subsequent claim, and alerted again to this issue at the formal hearing, has pointed to no extraordinary circumstances that would relieve him of this procedural default.

For this reason, the subsequent claim shall be dismissed. 20 C.F.R. § 725.308(c). I also find, in the alternative, and for the reasons set forth below, that the Claimant has failed to establish a change in any condition of entitlement that was adjudicated against him in the denial of his prior claim. On this basis, this subsequent claim must, in the alternative, be denied. 20 C.F.R. § 725.309.

Complete Pulmonary Evaluation

An important threshold issue is whether the Director has fulfilled the Department's statutory obligation to provide the Claimant with a complete pulmonary evaluation pursuant to Section 413(b) of the Act. 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§ 718.102, 725.405 and 725.406.

It is well-established that the Department of Labor has not satisfied this obligation if the physician who performed the pulmonary evaluation at the request of the Department has not addressed a necessary element of entitlement. *See* ***Cline v. Director, OWCP***, 972 F.2d 234, 14 B.L.R. 2-102 (8th Cir. 1992); ***Collins v. Director, OWCP***, 932 F.2d 1191, 15 B.L.R. 2-108 (7th Cir. 1991); ***Newman v. Director, OWCP***, 745 F.2d 1161, 1166 (8th Cir. 1984); ***Hodges v. BethEnergy Mines Corp.***, 18 B.L.R. 1-84 (1994); ***Hall v. Director, OWCP***, 14 B.L.R. 1-51 (1990).

Of concern is the medical report and opinions of Dr. Wicker. (DX 11). The doctor affirmatively diagnosis pneumoconiosis based on x-ray and exposure history. When called upon to render an assessment of respiratory disability, Dr. Wicker concluded that "[t]his individual's respiratory capacity does not appear to be adequate to perform his previous occupation in the coal mining industry due to his previous history of coal mining exposure and cigarette abuse." Judged on its own, this statement constitutes a sufficient opinion both as to the existence of pulmonary or respiratory disability, and an attribution of this impairment in part to Mr. Lawson's coal mine dust exposure. I am mindful that he responded "not applicable" to questions on the form that are addressed to the etiology of the diagnosed pulmonary condition, in this case pneumoconiosis, and the causation of the Claimant's inability to return to coal mining. Further, on a separate sheet, however, the doctor responded to check mark questions by making a notation that the Claimant suffered from "no impairment." Yet he again said that the Claimant did not have the respiratory capacity to perform the work of a coal miner. (DX 11).

In the final analysis, I am satisfied that Dr. Wicker's examination and medical report satisfy the Director's obligation under Section 413(b). A fair reading of his conclusions demonstrates that he diagnosed pneumoconiosis, based this diagnosis on more than a positive x-ray, that he found total respiratory disability because the Claimant was precluded from returning to coal mining, and provided an etiology of that disability in the form of the Claimant's "coal mining exposure and cigarette abuse." Dr. Wicker administered clinical testing as well. *See* ***Cornett v. Benham Coal Co.***, 227 F.3d 569, 576, 22 B.L.R. 2-107 (6th Cir. 2000). *Cf.* ***Worhach v. Director, OWCP,*** 17 B.L.R. 1-105 (1993) (diagnosis based solely on x-ray).

It is not required that this opinion require an award of benefits. It is only required that the report and conclusions be sufficient to substantiate a claim for benefits under the Act. If credited, Dr. Wicker's medical opinion would be sufficient to substantiate an award of benefits.

Change in Applicable Condition of Entitlement

Any time within one year of a denial or award of benefits, any party to the proceeding may request a reconsideration based on a change in condition or a mistake of fact made during the determination of the claim. *See* 20 C.F.R. 725.310. However, after the expiration of one year, the submission of additional material or another claim is considered a subsequent claim which will be denied on the basis of the prior denial unless the Claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. 20 C.F.R. 725.309(d). To assess whether this change is established, the ALJ must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes the existence of that element, he has

demonstrated, as a matter of law, a change in the applicable conditions of entitlement in a subsequent claim. Then, the ALJ must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits.

In this case, Claimant's prior claim was denied on December 5, 1997, with the Board's affirmance of the denial of benefits by Administrative Law Judge Robert R. Hillyard, because he failed to establish either pneumoconiosis or total respiratory disability. (DX 1). The Claimant will establish a change in the applicable conditions of entitlement by proving, on the basis of the newly developed evidence, that he suffers from pneumoconiosis or the presence of a totally disabling pulmonary or respiratory impairment due to pneumoconiosis. 20 C.F.R. §§ 718.204(b)(2), 718.204(c).

Pneumoconiosis

Under the Act, to receive benefits, a Claimant must prove several facts by a preponderance of the evidence. First, the coal miner must establish the presence of pneumoconiosis.[12]

Pneumoconiosis under the Act is defined as both clinical pneumoconiosis and/or any respiratory or pulmonary condition significantly related to or significantly aggravated by coal dust exposure:

> For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis or silico-tuberculosis, arising out of coal mine employment. For purposes of this definition, a disease "arising out of coal mine employment" includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

20 C.F.R. § 718.201.

Note that the definition appears to combine the first two elements of entitlement, pneumoconiosis and cause of pneumoconiosis. However, the Claimant bears the burden of establishing both that he or she has pneumoconiosis and that the pneumoconiosis arose out of coal mine employment.

This claim arises within the territorial jurisdiction of the Sixth Circuit. Accordingly, a miner may establish the existence of pneumoconiosis under any one of the alternate methods set forth at 20 C.F.R. §718.202(a). *See* ***Furgerson v. Jericol Mining, Inc.***, 22 B.L.R. 1-216 (2002) (en banc). I must therefore provide separate and distinct findings on the merits of each provision set forth at 20 C.F.R. § 718.202(a). There are four methods for determining the existence of pneumoconiosis.

---

[12] 20 C.F.R. § 718.201.

(1) Under 20 CFR § 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence.

(2) Under § 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. That method is not available in the instant case because this record contains no biopsy evidence.

(3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis; § 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of § 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982.

(4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 is set forth in subsection (a)(4) which provides in pertinent part:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion. 20 C.F.R. § 718.202(a)(4).

There is no evidence relevant to § 718.202 (a)(2). Accordingly, the Claimant can not establish the existence of pneumoconiosis under this section. Further, none of the enumerated presumptions apply in this case under § 718.202(a)(3). I will therefore turn to the x-ray and medical opinion evidence to determine whether the Claimant has established the presence of pneumoconiosis under either provision.

The subsequent claim record contains five readings of three x-rays. Only one film was interpreted as positive, Dr. Wicker's reading of the February 27, 2002 x-ray as demonstrating "2/2" category profusion. (DX 11). This film was reread as negative by Dr. Wiot. I shall defer to the latter's interpretation on the basis of his superior credentials. *See* ***Staton v. Norfolk & Western Railway Co.***, 65 F.3d 55, 59, 19 B.L.R. 2-271 (6th Cir. 1995). The latter two films were not read as positive. In view of this, I conclude that the Claimant has failed to meet his burden of proving the existence of pneumoconiosis on the basis of x-ray evidence.

I also find that the Claimant has failed to establish pneumoconiosis in this subsequent claim on the basis of medical opinion evidence. The sole medical opinion in support of such a finding was rendered by Dr. Wicker. (DX 11). I will accord this opinion little weight, first, because its diagnosis of pneumoconiosis is based on a chest x-ray that was reread as negative, *see* ***Winters v. Director, OWCP***, 6 B.L.R. 1-877 (1984), and, second, because Dr. Wicker

explains his diagnosis on the basis of history. "Occupational exposure is not evidence of pneumoconiosis, however, but merely a reason to expect that evidence might be found." ***Sahara Coal Co. v. Fitts***, 39 F.3d 781, 782, 18 B.L.R. 2-384 (7th Cir. 1994).

I also accord greater weight to the opinions of Dr. Dahhan, Repsher and Rosenberg. I will credit their credentials, the adequacy of their explanations and the thoroughness of their respective medical reports and conclusions. *See generally*, ***Clark v. Karst-Robbins Corp.***, 12 B.L.R. 1-149 (1989)(*en banc*); ***Lucostic v. United States Steel Corp.***, 8 B.L.R. 1-46 (1985). When bolstered by their overall documentation, including the preponderance of negative x-rays, largely normal findings on physical examination of the lungs and extremities by Drs. Dahhan and Rosenberg, and clinical testing, I find that the opinions of these experts preclude a finding of pneumoconiosis at Section 718.202(a)(4). Moreover, I find that these experts enjoy the advantage over Dr. Wicker by holding to a more complete view of the Claimant's medical records. *See* ***Balsavage v. Director, OWCP***, 295 F.3d 390, 397, 22 BLR 2-386 (3d Cir. 2002) (opinion of physician who did not address other medical records accorded less weight).

Because the Claimant has not proven the existence of pneumoconiosis in the subsequent claim on the basis of any applicable criteria, I find that he has not established a change in an applicable condition of entitlement by proving this element. The inquiry must therefore turn to whether the newly submitted evidence establishes total respiratory disability.

Total Respiratory Disability

Even assuming that the Claimant had established pneumoconiosis arising out of coal mine employment, I find that he has failed to establish total respiratory disability.

> Section 718.204(b) defines "total disability" as follows:
> A miner shall be considered totally disabled if ... pneumoconiosis as defined in § 718.201 prevents or prevented the miner:
>
> (1) From performing his or her usual coal mine work; and (2) From engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time.

The regulations at § 718.204(b) provide the following five methods to establish total disability:

> (1) pulmonary function (ventilatory) studies; (2) blood gas studies; (3) evidence of cor pulmonale; (4) reasoned medical opinions; and (5) lay testimony. 20 C.F.R. § 718.204(b).

I note that *any* loss in lung function may qualify as a total respiratory disability under Section 718.204(b)(2). *See* ***Carson v. Westmoreland Coal Co.***, 19 B.L.R. 1-16 (1964), *modified on recon*. 20 B.L.R. 1-64 (1996).

Initially, I find that the Claimant cannot demonstrate total respiratory disability at §§ 718.204(b)(2)(ii) and 718.204(b)(2)(iii), because the subsequent claim record does not contain

qualifying arterial blood gas tests and does not show cor pulmonale with right sided congestive heart failure.

I also find that the Claimant has not demonstrated total respiratory disability on the basis of pulmonary function testing at § 718.204(b)(2)(i). Although the test administered by Dr. Wicker yielded qualifying results, and one of the trials conducted for Dr. Rosenberg is borderline, the study conducted for the latter was performed with less than ideal effort. Further, the ventilatory study conducted by Dr. Dahhan has non-qualifying results for both the pre- and post-bronchodilator trials, notwithstanding the observation that the test was performed with "poor" effort. (DX 22). The pulmonary function study evidence does not demonstrate total respiratory disability by a preponderance of the evidence.

The last method by which the Claimant may demonstrate total respiratory disability is by a documented and reasoned medical opinion of total disability. 20 C.F.R. § 718.204(b)(2)(iv).

While Dr. Wicker opined that the Claimant did not have the respiratory capacity from returning to his usual coal mine employment, (DX 11), Drs. Dahhan, Repsher and Rosenberg took a different view. Dr. Dahhan concluded, based on his review, examination and clinical tests, that the Claimant could return to the mines from a pulmonary or respiratory standpoint. (DX 22). Dr. Repsher, similarly, concluded that the Claimant was not disabled from returning to the mines. (EX 3). Dr. Rosenberg was impressed by the results of clinical testing, which were above disability standards. (EX 6).

I find that the opinions with respect to disability rendered by Drs. Dahhan, Repsher and Rosenberg are better documented and reasoned. Their conclusions are bolstered by the findings on the physical examinations conducted by Drs. Dahhan and Rosenberg, as well as their review not only of the clinical testing but also of the Claimant's other medical records. I consider the reasoning of their reports more credible in view of the support for their assessments in the non-qualifying clinical test results and by negative or normal physical examination findings. ***Clark v. Karst-Robbins Corp.***, 12 B.L.R. 1-149 (1989)(*en banc*); ***Lucostic v. United States Steel Corp.***, 8 B.L.R. 1-46 (1985). I therefore find that the Claimant has failed to demonstrate total respiratory disability at § 718.204(b)(2)(iv). Without corroborating medical evidence, moreover, the Claimant's testimony cannot support a finding of total respiratory disability. ***Madden v. Gopher Mining Co.***, 21 B.L.R. 1-122 (1999). *See also,* ***Fife v. Director, OWCP,*** 888 F.2d 365, 370, 13 B.L.R. 2-109 (6th Cir. 1989).

Finally, after independently weighing all relevant evidence pursuant to 20 C.F.R. § 718.204(b)(2), like and unlike, including Claimant's sincere testimony at the hearing and at the deposition, and considering the exertional requirements of a shuttle car operator, roof bolter and motor man, which are heavy labor, I nevertheless find that Claimant has not established total respiratory disability on the basis of the newly submitted evidence on this subsequent claim. *See* ***Fields v. Island Creek Coal Co.***, 10 B.L.R. 1-19 (1987); ***Shedlock v. Bethlehem Mines Corp.***, 9 B.L.R. 1-195 (1986), *aff'd on recon. en banc*. 9 B.L.R. 1-236 (1987).

I therefore find that because the Claimant has not established total respiratory disability on the subsequent claim, he has not proven a change in this element of entitlement. Because the

Claimant has not established that he now suffers from pneumoconiosis or a totally disabling pulmonary or respiratory impairment, I find that he has not shown that one of the conditions of entitlement has changed since the final denial of his prior claim. I must therefore find that benefits must be denied. 20 C.F.R. § 725.309(d).

Conclusion

I initially find that this claim is untimely. Mr. Lawson filed this subsequent claim on December 27, 2001, more than three years after receiving a medical opinion of total disability due to pneumoconiosis. The record rebuts the presumption of timeliness. Counsel for the Claimant was referred at the formal hearing to 20 C.F.R. § 725.308, and has not persuasively asserted extraordinary circumstances that would relieve him from procedural default. I therefore dismiss this claim.

In the alternative, I find that because the Claimant has not established that any applicable condition of entitlement has changed since the denial of his previous claim, this subsequent claim must be denied pursuant to 20 C.F.R. § 725.309(d). In evaluating the medical evidence, I have carefully reviewed the medical opinion of Dr. Wicker, and conclude that his report and associated conclusions satisfy the Department's obligation to provide the Claimant with a complete pulmonary evaluation. While I do not find Dr. Wicker's conclusions to be persuasive, I nevertheless find that he has addressed all of the elements of entitlement. He has diagnosed pneumoconiosis, opined that the Claimant does not have the respiratory capacity to return to mining, and said that this inability to perform his last coal mine employment can be attributed to the combined effects of smoking and pneumoconiosis.

Attorney's Fees

The award of an attorney's fee under the Act is permitted only in cases in which Claimant is found entitled to benefits. Since benefits are not awarded in this case, the Act prohibits the charging of attorney's fees to the Claimant for representation services rendered in pursuit of the claim.

ORDER

It is hereby **ordered** that the claim of Charlie Lawson is **denied**.

A

DANIEL F. SOLOMON
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision and Order by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Room N-2117,